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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

RAYMOND W. LONDON, on Behalf of Himself and All Others Similarly Situated, Plaintiff, v. NEW ALBERTSON'S, INC.; CERBERUS CAPITAL MANAGEMENT (CALIFORNIA), LLC; and SAVE MART SUPERMARKETS and DOES 2 through 25, inclusive, Defendants.	Case No.: 08 CV 1173 H CAB Assigned to: Hon. Marilyn Huff **PLAINTIFF'S RESPONSE TO MOTIONS TO DISMISS BROUGHT BY DEFENDANTS NEW ALBERTSON'S, INC. AND CERBERUS CAPITAL MANAGEMENT (CALIFORNIA), LLC** Date: August 11, 2008 Time: 10:30 A.M. Courtroom: 13, Fifth Floor Judge: Hon. Marilyn L. Huff

Plaintiff, Raymond W. London ("Plaintiff"), hereby files this response to the separate motions to dismiss filed in the above matter by defendants New Albertson's, Inc. ("Albertson's") and Cerberus Capital Management (California), LLC ("Cerberus").

I. INTRODUCTION

On May 29, 2008, Plaintiff filed a class action complaint in San Diego Superior Court against Albertson's and Cerberus alleging their violation of, among other state law claims, California's Confidentiality of Medical Information Act [Cal. Code Civ. Proc., §§ 56, *et seq.*] (the "CMIA") in connection with said defendants' utilization, sharing and sale of inadequately "anonymized" confidential patient medical and prescription drug information to pharmaceutical companies – via third party "data mining" companies such as IMS Health, Inc., and/or Verispan, Inc. (Complaint, ¶ 7).

On July 1, 2008, Plaintiff availed himself of the ministerial procedure provided under Cal. Code Civ. Proc., § 474, to include Save Mart Supermarkets ("Save Mart") as an additional named defendant pursuant to San Diego Superior Court form CIV-12. *See* Exhibit A hereto.[1] The following day, Albertson's and Cerberus removed this action to federal court pursuant to 28 U.S.C. §§ 1453 and 1332. (Docket Entry # 1).

Thereafter, on July 10, 2008, Albertson's filed a motion to dismiss principally claiming that the federal Health Insurance Portability and Accountability Act sanctions its sale of partially de-identified patient medical information to pharmaceutical companies irrespective of California's CMIA. *See, e.g.*, Albertson's Mot., at pp. 11-12 (Docket Entry #'s 5-7). Defendant Cerberus separately moved to dismiss arguing that its divestiture of its Albertson's retail grocery stores and

[1] Under California law, "[a]n amendment substituting the true names of fictitious defendants is not a matter of substance because it does not change the cause of action nor affect the issues raised by the pleadings." Vincent v. Grayson (1973) 30 Cal.App.3d 899, 905 n.2, *citing* Drotleff v. Renshaw (1949) 34 Cal.2d 176, 181-182; *accord*, Streicher v. Tommy's Electric Co. (1985) 164 Cal.App.3d 876, 884-885.

their on-site pharmacy operations in California (primarily to defendant Save Mart) negates its liability under both the CMIA and the other claims pled in Plaintiff London's removed complaint. Cerberus Mot., at pp. 3-7 (Docket Entry # 11).[2]

II. ARGUMENT

A. DEFENDANTS MOTIONS TO DISMISS ARE MOOT INASMUCH AS PLAINTIFF HAS FILED A FIRST AMENDED COMPLAINT

Rule 15(a)(1)(A), of the Fed. R. Civ. Proc. permits a party to substantively amend its pleading once as a matter of course before being served with a "responsive pleading." It is well settled that a motion to dismiss is ***not*** a "responsive pleading" within the purview of Rule 15(a) and, therefore, does not preclude plaintiff London from now amending his complaint to cure certain deficiencies raised in the defendants' motions to dismiss and, thus, streamline this action. Allen v. Veterans Admin., 749 F.2d 1386, 1388 (9th Cir.1984); *see also* Mayes v. Leipziger, 729 F.2d 605, 607 (9th Cir.1984); Breier v. N. Cal. Bowling Proprietors' Ass'n, 316 F.2d 787, 789 (9th Cir. 1963).

Since no responsive pleading has been filed, Plaintiff has exercised his right to substantively amend his pleading once as a matter of course, and plaintiff's First Amended Complaint effectively moots defendants' pending motions to dismiss. Doe v. Lassen Community College Dist., No. 07-CV-01521 LEW (DADx), 2007 WL 4623042, at *1 n.1 (E.D.Cal. Dec. 8, 2007) (filing an amended complaint effectively mooted defendants' motions to dismiss); Gorman v. Wolpoff & Abramson, LLP, 370 F.Supp.2d 1005, 1007 (N.D.Cal. 2005) (technically plaintiff's first amended complaint rendered moot defendants' motions to dismiss); Forsman v. Chicago Title Ins. Co., No. 05-CV-3514-PHX-FJM, 2006 WL 4682253, at *1 (D.Ariz. Jan. 20, 2006) (denying, as moot, defendant's motion to dismiss plaintiff's original complaint upon filing an amended complaint).

More specifically, Plaintiff London has included additional factual allegations in the First

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[2] Although served with the DOE Defendant Amendment, defendant Save Mart has neither joined in Albertson's and Cerberus' removal petition nor joined in their Fed. R. Civ. Proc. 12(b)(6) motions to dismiss.

Amended Complaint to more concisely establish that Defendants' purported procedure and protocols by which patient confidential medical information is "anonymized" was performed in an inadequate and legally deficient manner, in that defendants' processes nonetheless allow for the reconstitution of the patient's confidential medical information when combined with publicly and privately available information in violation of the CMIA. Further, Plaintiff has included additional factual allegations (principally facts appearing in defendant Albertson's public filings with the Securities and Exchange Commission) establishing Cerberus' ownership and control of Albertson's Pharmacy operations and contractual assumption of liability for some or all of the activities alleged in this lawsuit to be improper.

III. CONCLUSION

On the basis of the foregoing, and in light of the fact that defendant Albertson's and Cerberus' motions to dismiss are now moot, plaintiff London respectfully submits that they be denied on that basis.

Dated: July 28, 2008

Respectfully submitted,

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Case No. 08-cv-1173 H-CAB

CERTIFICATE OF SERVICE

I, Andrea Vasquez, certify that on July 28, 2008, I electronically filed the foregoing PLAINTIFF'S RESPONSE TO MOTIONS TO DISMISS BROUGHT BY DEFENDANTS NEW ALBERTSON'S, INC. AND CERBERUS CAPITAL MANAGEMENT (CALIFORNIA), LLC with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to the following individuals:

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And by over night mail to:

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DATED: July 28, 2008 /s/ Andrea Vasquez

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